IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7147 of 2001

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI Sd/-
and
HON'BLE MR.JUSTICE D.H.WAGHELA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

1 & 2 YES; 3 to 5 NO

MANSING R. DODIYA 7TH JOINT CIVIL JUDGE

Versus

HIGH COURT OF GUJARAT

Appearance:

1. Special Civil Application No. 7147 of 2001

MR PV HATHI for Petitioner No. 1

MR JB PARDIWALA for Respondent No. 1-2

MR RC KODEKAR AGP for Respondent No. 3

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.H.WAGHELA

Date of decision: 01/09/2004

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.H.WAGHELA for the Court)

1. By this petition under Article 226 of the Constitution, a Civil Judge (Senior Division) has challenged the order dated 28.4.2001 of the High Court by which he was not permitted to cross the efficiency bar in the pre-revised scale of Rs.2200-75-2800-EB-100-4000 for Civil Judge (Junior Division) with effect from 1.12.1993 to 31.12.1995 and was permitted to cross the efficiency bar in question only with effect from 1.1.1996.

2. It is the case of the petitioner that, after several representations, he received for the first time in February, 1999 a communication from the District Judge stating that the High Court had directed to give to the petitioner pay scale at the stage before crossing of the efficiency bar in the old scale at Rs.2800/- in the pre-revised scale since the question of permitting him to cross the efficiency bar at the stage of Rs.2800/- was deferred till disposal of the Criminal Revision Application No.254 of 1997 which was pending in the High Court. Pursuant to his repeated representations, personal hearing was granted to the petitioner and, after the report of the learned Administrative Judge concerned, the High Court had decided not to permit the petitioner to cross the efficiency bar with effect from 1.12.1993 to 31.12.1995. The petitioner had, therefore, requested the Registrar to supply authenticated copies of the order of the so-called proposed punishment and the documents on which reliance was placed. However, he was replied with a letter to the effect that the communication dated 28.4.2001 was itself the decision.

3. The pay of the petitioner was accordingly fixed in the revised pay scale and the petitioner is stated to have incurred huge recurrent financial loss due to the impugned decision. On the basis of these facts, the learned counsel Mr.Hathi vehemently argued that the petitioner was denied proper opportunity of being heard before passing the impugned order which was obviously penal in nature and which had adverse consequences for the petitioner. He submitted that not only that the order was passed by way of penalty, but the decision was delayed by no less than seven years and the personal hearing given to the petitioner was an idle formality. He further submitted that as far as the record of service of the petitioner was concerned, he had earned "Reasonably Good" and "Good" remarks in the years 1995 to 2000 and was also promoted to the higher post. The remarks as regards disposal for the period from 1991 till

1995, which showed "Poor performance", was alleged to be mainly due to the strikes declared by the lawyers in the Court.

3.1 The learned counsel relied upon the judgment of the Supreme Court in STATE OF MAHARASHTRA AND OTHERS v. UTTAMRAO RAYALA NIKAM [(1994) 2 SCC 116] to point out that stoppage of increment was not an all-time and permanent stagnant block for the rest of the career and a wholesome procedure of yearly meticulous exercise of assessment was envisaged under the Rules in that case and flagrant violation thereof was deprecated. Relying upon the judgment of the Supreme Court in PADAM SINGH JHINA v. UNION OF INDIA AND ORS. [(1974) 1 SLR 594], it was submitted that even in absence of specific Rules governing crossing of efficiency bar and requiring that an order in this behalf must precede the date on which the public servant is to cross the efficiency bar, in fairness, the order preventing him from crossing the efficiency bar should be passed either before the appointed date or shortly thereafter. However, in that case the Supreme Court had also found that no effective relief could be granted for failure to make an order at the appropriate time in the year 1963 and, trusting the authorities, consideration of the question of crossing of efficiency bar in light of the service record was ordered in the year 1974. The judgment of this Court in T.C.BHARGAV v. STATE OF GUJARAT [1984 (1) GLR 264], holding that uncommunicated remarks could not have been taken into consideration for assessing the performance, was relied upon, but it could not be shown as to how it was relevant or applicable in the facts of the present case.

4. As against the averments made by the petitioner, by filing an affidavit of the Deputy Registrar, it is stated on behalf of the respondent that, at the relevant point of time, a decision on the administrative side of the High Court was taken to defer the question of permitting the petitioner to cross the efficiency bar till disposal of Criminal Revision Application No.254 of 1994 which was pending in the High Court. Even as that order to defer the question was operating and the Criminal Revision Application No.254 of 1994 was also pending, the pay scales of Judicial Officers were revised with effect from 1.1.1996 and in line with the Government Resolution dated 27.3.1998, the competent authority was required to consider the cases in which crossing of efficiency bar had become due before 1.1.1996 and where officers were stopped at the efficiency bar. Therefore, the case of the petitioner was ordered to be placed

before the Standing Committee and it decided that the petitioner be given a personal hearing by the Hon'ble Administrative Judge of the Unit concerned. Accordingly, the file of the petitioner was placed before the Hon'ble Administrative Judge, the petitioner had remained present before him and the petitioner was appraised of his figures of disposal for the period from 1991 till 1995. According to the data placed for consideration, the petitioner's disposal was classified as "Poor" for all the 12 quarters in the years 1991 to 1993, whereas in the years 1994 and 1995, his disposal was "Just adequate" in one quarter and was "Poor" in two quarters and such disposal was not assessed for five quarters. The petitioner had not disputed the said data of disposals and its categorization as "Poor" and "Just adequate". The petitioner was also appraised of the adverse remarks in his confidential reports for the periods from 1.1.1990 to 8.7.1990, 1.1.1991 to 21.4.1991, 1.1.1992 to 23.6.1992, 1.1.1994 to 13.6.1994 and one remark in the confidential report for the year 1995 and he had admitted that all those remarks were communicated to him at the relevant time. According to the affidavit, the petitioner had nothing to say when it was put to him that, prima facie, it was not a fit case for permitting crossing of the efficiency bar with effect from 1.12.1993, 1.12.1994 or 1.12.1995. Thus, the petitioner was not found efficient enough to be permitted to cross the efficiency bar either at the end of the years 1993, 1994 or 1995. However, for the purpose of next date of increment after 1.1.1996, in absence of any provision for efficiency bar in the Gujarat Civil Services (ROP) Rules, 1998, increments were required to be released after 1.1.1996 without making any review and order permitting the petitioner to cross the efficiency bar.

4.1 It is further stated on oath by the Deputy Registrar of the High Court that the aforesaid report of the Hon'ble Administrative Judge was placed before the Standing Committee for recommending to the Chamber and at the Chamber Meeting held on 21.4.2001, the High Court had accepted the recommendation of the Standing Committee to stop the petitioner from crossing the efficiency bar.

5. The factual aspect of the aforesaid narration was verified by us from the original record of the proceedings held by the Hon'ble Administrative Judge and a copy thereof was also made available to the learned counsel for the petitioner for his perusal. It was found that the averments made in the affidavit of the Deputy Registrar were clearly borne out from the record.

6. On the basis of the above, it was submitted by the learned counsel Mr.Pardiwala, appearing for the respondent, that, according to the statutory Rule contained in Rule 46 of the Bombay Civil Services Rules, where efficiency bar is prescribed in a time scale, increment next above the bar cannot be given to a government servant without specific sanction of the competent authority and, therefore, crossing of the efficiency bar was neither automatic nor a matter of right. It was in the discretion of the authority concerned to allow a servant to cross the efficiency bar and was a matter of subjective satisfaction based on overall assessment of the service record of the officer with respect to his efficiency, integrity, intelligence etc. Taking support from the provisions of Rule 6 of the Gujarat Civil Services (Discipline and Appeal) Rules, 1971, it was submitted that stoppage of pay at the efficiency bar in the time scale was not a penalty. It was pointed out from the record that neither malice nor arbitrariness was even alleged even as the grievance was restricted to deferment of decision on crossing of the efficiency bar due to pendency of the Criminal Revision Application pending before the High Court. It was, however, clear from the record that the question of crossing of the efficiency bar was examined and decided on merits and completely disregarding the pendency of the Criminal Revision Application No.254 of 1994, and the relevant consideration of remarks in the confidential reports alone had weighed in taking the decision which was communicated to the petitioner. It was also clear that the petitioner was afforded adequate opportunity of being heard and appropriate decision was taken after recording reasons.

6.1 Referring to Rule 4.8 of the Punjab Civil Service Rules, which is in pari materia with the aforesaid Rule 46 of the Bombay Civil Services Rules, the Supreme Court has held in HARYANA WAREHOUSING CORPORATION v. RAM AVTAR AND ANOTHER [AIR 1996 SC 1081] that, where an efficiency bar is prescribed in a time scale, the next increment above the bar is not to be given to an employee without specific sanction of the authority empowered to withhold increments. This provision does not contemplate any hearing being granted to an employee before a decision is taken with regard to permitting or non-permitting an employee to cross the efficiency bar. The stoppage of an employee at the efficiency bar is not by way of punishment and does not cause any stigma on the employee. Where efficiency bar is inserted in a time scale, it only means that, at that stage, annual increment is not as of right but the bar will be removed, and an employee

allowed further increments if the authority concerned comes to the conclusion that such an employee is not inefficient. An opinion to this effect has necessarily to be a subjective one though it must be based on relevant facts. It is clearly held by the Apex Court that consideration of all material before taking the decision is sufficient compliance of the requirement as far as the principles of natural justice are concerned. In BHAWANI SHANKAR SHARMA v. UNION OF INDIA [(1974) 3 SCC 9], a grievance was made before the Supreme Court that the employee was not informed of the reasons for coming to the conclusion that his work was inefficient. The Apex Court held that the conclusion that the officer's work was inefficient was based on his records as well as on the opinion formed by his superior. Inefficiency is something which cannot be concretised.

This Court has also, in N.S.MADHAVAN v. PHYSICAL RESEARCH LABORATORY & ANR. [1983 (2) GLR 1465], taken the view that the question whether the authorities were satisfied about the work of an officer was required to be decided by the authorities themselves and the Court has to see that the authorities did not take arbitrary or capricious decision.

7. Thus, the legal position in respect of crossing of the efficiency bar is well-settled and, as seen earlier, in the present case the petitioner was afforded sufficient opportunity of being heard and the impugned decision was taken after consideration of the relevant material at more than one level. The loss caused to the petitioner has to be taken as the necessary consequence of and not as a ground against the impugned order; and the order to defer the decision on crossing of the efficiency bar could not be shown to have caused any prejudice to the petitioner. The contention that the decision on the question of crossing of the efficiency bar ought to have been taken at the end of the year 1993 and at the end of each subsequent year has also to be negatived in view of the observations of the Supreme Court in PADAM SINGH (supra) wherein the delay was not held to be fatal but the authorities were allowed to decide the question after almost eleven years in the facts and circumstances of the case. In these facts, we hold that, although it would have been ideal if the question of efficiency bar were decided at the appropriate time when crossing of the efficiency bar was due, it was not a fatal lapse which could invalidate or vitiate the order which was ultimately made after

consideration of the relevant material and affording

adequate opportunity of being heard to the petitioner. The petition is, therefore, rejected and Rule is discharged with no order as to costs.

Sd/-

(R.K.Abichandani, J.)

Sd/-

(D.H.Waghela,J.)

(KMG Thilake)